Supreme Court, U. S.
FILED
JUL 14 1977
MICHAEL RODAK, JR., CLERK

No.

In the Supreme Court of the United States

OCTOBER TERM, 1976

77-82

CHARLOTTE CICHANSKI,

Petitioner,

VS.

HONEYWELL, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

TERRY YALE FEIERTAG
39 South LaSalle Street
Chicago, Illinois 60603
Counsel for Petitioner

Of Counsel:
DALE E. McNIEL
JOSEPH MINSKY
MINSKY, LICHTENSTEIN & FEIERTAG, P.C.
39 South LaSalle Street
Chicago, Illinois 60603

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

INDEX

PAGE

Opinions Below 2

Jurisdiction 2

Questions Presented 2

Statutes Involved 3

Statement of the Case 3

Reasons for Granting the Writ 7

1. The Seventh Circuit has refused to follow *McDonnell Douglas* v. *Green* 7

2. The Seventh Circuit has imposed on persons alleging sex discrimination in employment higher standards of proof than on persons claiming race discrimination 21

Conclusion 24

Certificate of Service 25

Appendix A—Judgment of the United States District Court for the Northern District of Illinois, Eastern Division in Case No. 74 C 754 .....App. 1

Appendix B—Decision of the United States District Court for the Northern District of Illinois, Eastern Division in Case No. 74 C 754 .....App. 2

Appendix C—Order of the United States Court of Appeals for the Seventh Circuit in Case No. 74 C 754, affirming the judgment of the District Court .....App. 8

Appendix D—Order of the United States Court of Appeals for the Seventh Circuit in Case No. 74 C 754, denying petition for Rehearing .....App. 15

PAGE

Appendix E—Order of the Supreme Court of the United States extending time in which to file Petition ..... App. 16

TABLE OF CITATIONS

Cases

Franks v. Bowman Transp. Co., Inc., 424 U.S. 747 (1976) 7, 23

Johnson Bronze Co. v. Ostapowicz, 541 F.2d 394 (3rd Cir. 1976), cert. denied —— U.S. ——, 45 U.S.L.W. 3463 (1977) 7

Marquez v. Omaha Dist. Sales Office, Ford Div., 440 F.2d 1157 (8th Cir. 1971) 10

McDonnell Douglas v. Green, 411 U.S. 792 (1973) ..2, 7, 8, 9, 10, 12, 15, 16, 21, 24

United States v. Jacksonville Terminal Co., 451 F.2d 418 (5th Cir. 1971) 10

Statutes

Title VII of the Civil Rights Act of 1964 as amended 42 U.S.C. §2000e *et seq.* 2, 3, 7, 8, 16, 18, 19, 20, 23

In the Supreme Court of the United States

OCTOBER TERM, 1976

NO.

CHARLOTTE CICHANSKI,

Petitioner,

vs.

HONEYWELL, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable Warren E. Burger, Chief Justice of the Supreme Court of the United States and the Associate Justices of the Supreme Court of the United States

This is a petition by Charlotte Cichanski for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above case.

OPINIONS BELOW

1. The opinion of the District Court is unreported. A copy thereof is attached hereto as Appendix B (App. 2).

2. The opinion of the Court of Appeals is unreported. A copy thereof is attached hereto as Appendix C (App. 8).

JURISDICTION

The date of the judgment sought to be reviewed and the time of its entry is, December 6, 1976 as shown by Appendix C (App. 8).

A timely motion for Rehearing was filed and an order denying a rehearing was entered on February 15, 1977 as shown by Appendix D (App. 15).

A timely Application for Extension of Time Within Which to File Petition for Certiorari was filed, and was granted on May 5, 1977, allowing until July 15, 1977 to file this Petition as shown by Appendix E (App. 16).

Jurisdiction of this cause is conferred on the Supreme Court by 28 U.S.C. §1254.

QUESTIONS PRESENTED

1. Are the standards for the disposition of private, non-class actions challenging employment discrimination prohibited by Title VII of the Civil Rights Act of 1964, as amended, as articulated by the Supreme Court in *McDonnell Douglas* v. *Green*, 411 U.S. 792 (1973) mandatory on the Circuit Courts of Appeals?

2. Are private non-class actions brought pursuant to Title VII of the Civil Rights Act of 1964, as amended, challenging employment discrimination based on sex governed by the same standards of disposition as comparable actions challenging employment discrimination based on race?

STATUTES INVOLVED

Title VII of the Civil Rights Act of 1964, as amended, 78 Stat. 253, 42 U.S.C. §2000e *et seq.*, provides in §703:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
>
> 42 U.S.C. §2000e-2(a)

STATEMENT OF THE CASE

Petitioner, Charlotte Cichanski, is a 55 year old woman who was first employed by the Respondent, Honeywell, Inc. (Honeywell), on October 16, 1950 and was terminated by Honeywell on February 10, 1972. During her employment with Honeywell, Ms. Cichanski worked in various capacities in the Production Planning, Stationery, Accounting, Methods, Applications, Steno Pool, and Quality Departments. For the last ten years of her employment with Honeywell, Ms. Cichanski worked in the Quality Department and the final three of those years were spent under the supervision of Mr. Sanford Egesdal. In the six to eight months immediately preceding her termination, Ms. Cichanski made repeated requests for a transfer or

promotion which would have taken her away from Mr. Egesdal's supervision.

Ms. Cichanski filed her verified charge of sex discrimination against Honeywell with the EEOC on June 10, 1972, in the form of case file number TCH 2-2248. The charge was processed in accordance with the mandate of Title VII, and a copy of the charge was served on Honeywell. Ms. Cichanski requested and was mailed her right to sue letter on February 8, 1974. Ms. Cichanski then filed the instant action on March 20, 1974, in the United States District Court for the Northern District of Illinois.

At the trial of this matter, Honeywell stipulated that its non-factory force of supervisors at the Morton Grove and Arlington Heights facilities at which Plaintiff was employed was as follows:

1969—33 males and 1 female;
1970—55 males and 4 females;
1971—56 males and 4 females;
1972—54 males and 3 females.

Honeywell further stipulated that all ten of Ms. Cichanski's supervisors during her 21 years, 4 months employment with Honeywell were male.

Of all persons employed in the Quality Department from December 1969 through December 1974, 100% of those employed as supervisors were male, 100% of those employed as engineers and technicians were male and 100% of those employed as clericals were female. Of the persons supervised by Mr. Egesdal, all of the engineers and technicians were male and the only clerk-typists, Ms. Cichanski and the woman who replaced her, were female.

Ms. Cichanski also repeatedly sought to introduce evidence of company wide sexual stratification. This rejected evidence showed men overwhelmingly predominant in

technical, administrative, and supervisory positions, and women in a similar predominance in clerical positions. It also showed a very significant sexual disparity in salary grade within these categories. All of this evidence was excluded as lacking relevancy.

The only supervisors to make periodic formal written evaluations of Ms. Cichanski's job performance during her 21 years of employment at Honeywell were Mr. Baron (8/10/64); Mr. Beck (5/11/66); Mr. Mikol (7/5/67 and 8/7/68); and Mr. Egesdal (9/12/69 and 12/7/70). On each of these written evaluations Ms. Cichanski's work performance at Honeywell was rated as "outstanding" according to the Honeywell compensation manual. The Honeywell compensation manual defines "outstanding performance" as follows:

> An employee in this level should have mastered every element of the assigned job and should be performing at a level well beyond that normally expected. Such an employee will add elements of performance which are clearly the result of the employee's own personal imagination or initiative. This level of performance approaches the *best* that might possibly be expected of any employee on a given job.

On February 7, 1972, on the very day he decided to procure Ms. Cichanski's termination, Mr. Sanford Egesdal prepared another type of employee evaluation of petitioner, which was known as a Quarterly Manpower Management Review, in which he rated her "overall performance of objectives" as "average," and at trial he testified that that rating related to a combination of both the work product and work conduct of Ms. Cichanski.

Honeywell's "Personnel Policies and Procedures" specified that the environment of an apparently "failing" em-

ployee should be carefully examined to determine if such external factors as "poor supervisory-subordinate relationships, organization confusion, inequitable treatment and the like" are causing an employee's failure. If so, the corrective action mandated is to remove those negative factors rather than the employee. Reassignment of the employee is to be used where possible as an alternative to termination, and a thorough review of the entire situation should be made, particularly where a long term employee is involved.

Honeywell's policies specify the grounds for discharge of an employee as:

a. Inability to perform assigned duties because of lack of necessary experience, education, mental ability or health.

b. Willful misconduct or infractions of established Company rules.

c. Insubordination or refusal to follow directions of supervisor.

d. Excessive absenteeism.

When contemplating the termination of an employee 40 years of age or over *and* with 15 or more years of Honeywell service, the facts of the case are to be reported through the normal line organization to G. E. Morse, Corporate Vice President, Employee Relations, at least one month in advance of notice of termination. The petitioner was terminated without compliance with this procedure.

REASONS FOR GRANTING THE WRIT

1. THIS COURT SHOULD GRANT THE INSTANT PETITION BECAUSE THE SEVENTH CIRCUIT COURT OF APPEALS HAS REFUSED TO APPLY THE SUPREME COURT'S STANDARDS FOR THE DISPOSITION OF PRIVATE, NON-CLASS ACTIONS CHALLENGING EMPLOYMENT DISCRIMINATION PROHIBITED BY TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 AS AMENDED, AND HAS SANCTIONED THE DISTRICT COURT'S REFUSAL TO FOLLOW THESE SAME STANDARDS.

In *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) this Court established a three step rule to govern the allocation of the burden and order of proof in actions under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, 42 U.S.C. §2000e *et seq.*:

> The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of . . . discrimination.
>
> • • •
>
> The burden[1] then must shift to the employer to

[1] Subsequent decisions of this Court and of the Courts of Appeals have clarified that the employer bears not simply a burden of going forward with evidence at the second stage but a burden of proof that the complained of personnel decision was taken for a legitimate, non-discriminatory reason. See *Franks* v. *Bowman Transportation Co., Inc.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976). See also *Johnson Bronze Co.* v. *Ostapowicz*, 541 F.2d 394 (3rd Cir. 1976), cert. denied ..... U.S. ....., 45 U.S.L.W. 3463 (1977).

> articulate some legitimate, nondiscriminatory reason for the [personnel action or practice complained against].
>
> • • •
>
> [If the employer meets its burden at the second stage, the complainant must] be afforded a fair opportunity to show that [the employer's] stated reason for [the complained of action or practice] was in fact pretext.

411 U.S. at 802-04.

This Court outlined the factual showing which would be sufficient to establish a *prima facie* case of proscribed discrimination in the context of a refusal to hire a minority applicant and recognized that the *prima facie* proof would vary in differing Title VII factual situations. 411 U.S. at 802, n.13.

This Court also discussed at length the nature of evidence which would be especially relevant toward showing that a purported reason was in fact a pretext or coverup for a discriminatory action. Such proofs included: (1) evidence of the employer's treatment of the employee during the term of his employment, (2) evidence that employees who were not members of the complainant's class committed acts of comparable seriousness to that charged against the complainant but were nevertheless retained, or (3) evidence of the employer's general policy and practice with respect to employees in the complainant's class and, in particular, statistics tending to show a general pattern of discrimination by the employer against members of the complainant's class. 411 U.S. at 804-05.

Following a trial on the merits before a District Judge sitting with an advisory jury, the District Court below, disregarding the advisory jury's verdict, entered judgment for the respondent on all of petitioner's claims and rendered a decision which wholly ignored the method of

analysis and the standards mandated by this Court's rule in *McDonnell Douglas.* On appeal the Court of Appeals for the Seventh Circuit approved the District Court's refusal to follow the *McDonnell Douglas* rule. A recounting of the nature and substance of the proofs offered by the parties at trial compels this Court to grant the instant Petition for Certiorari in order to prevent the Seventh Circuit Court of Appeals from doing violence to the congressionally mandated purposes of Title VII as protected by this Court's decision in *McDonnell Douglas Corp.* v. *Green,* supra.

At the close of Ms. Cichanski's case in chief[2] the District Court denied Honeywell's motion for a directed verdict and found that she had established a "rather questionable *prima facie* case." In its decision the District Court found that "[t]he facts are that substantially more men are employed in certain positions of the defendant's plant than are women and at generally higher salaries, that men are given greater privileges with respect to lunch, coffee breaks and late arrival than women, and that defendant discharged the plaintiff without following its usual written policy procedures." (App. 3). The District Court also noted in its decision that "[d]efendant concedes that it made a 'subjective evaluation' . . . ." (App. 5)

That the District Court refused to make the intensive scrutiny of Honeywell's stated reasons for its treatment of Ms. Cichanski as is mandated by this Court's opinion

---

[2] As this Court recognized in *McDonnell Douglas Corp.* v. *Green,* supra, the tripartite ebb and flow of proofs in Title VII actions would vary with each case. In the instant matter petitioner presented in her case in chief both her *prima facie* case and evidence to show Honeywell's interposed defense to be pretextual.

in *McDonnell Douglas* is made manifest by its repeated assertions that there is *no evidence* that petitioner was discharged because of her sex. The District Court asserted in its opinion that "we find *no reason* to question the good faith of the defendant or the supervisor." (App. 5) (emphasis added). But just such a questioning is absolutely required if Ms. Cichanski is to have her "full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for [her discharge] were in fact a coverup for a [sexually] discriminatory decision." *McDonnell Douglas Corp.* v. *Green,* id, at 805.

The evidence revealed that Ms. Cichanski worked in an immediate environment in which females were totally and exclusively segregated into the lowest positions, and further statistical data was offered to show Honeywell's highly stratified pay and job structure among all non-production employees in the facility in which Ms. Cichanski was employed. Such evidence was explicitly recognized by this Court in *McDonnell Douglas* as being "helpful to a determination of whether [an employer's actions with respect to an individual] conformed to a general pattern of discrimination . . . ." 411 U.S. at 805.

Many courts have recognized that proof of even overt discrimination is seldom direct. See e.g., *United States* v. *Jacksonville Terminal Co.,* 451 F.2d 418 (5th Cir. 1971); *Marquez* v. *Omaha District Sales Office, Ford Div.,* 440 F.2d 1157 (8th Cir. 1971). Where discriminatory actions and practices are subtle and elusive, statistical data become even more important for placing employment practices in their proper perspective. Although Honeywell offered no explanation for the total sexual stratification of employees in its Quality Department, the District Court declared that "there is no objective evidence that the defendant discriminated generally against women . . . with respect to job classifications." (App. 6)

The evidence showed, and the District Court found, "that men are generally given greater privileges with respect to lunch, coffee breaks and late arrival than women. . . ." (App. 3) The District Court also found that women "were not treated entirely the same as men, because the job content and their duties differed," (App. 6) but Honeywell offered no such justification for this disparate treatment and Mr. Egesdal insisted that the starting and quitting times and break times were the same for all employees in the Quality Department.

The incidents which precipitated Mr. Egesdal's decision to procure the discharge of Ms. Cichanski confirm the sexually discriminatory nature of that decision. Ms. Cichanski's unrebutted testimony shows that on February 6, 1972, Mr. Egesdal severely reprimanded and threatened to physically assault her for allegedly attempting to leave work earlier than the official quitting time of 4:15 P.M. when one clock in the office showed the time as 4:15 P.M. and the other clock showed 4:14 P.M. On the following day, Mr. Egesdal called petitioner into his office to conduct what he claimed was a routine "Quarterly Manpower Management Review" during which he rated petitioner's overall performance as average. When Ms. Cichanski refused to close the door to his office for fear that he would assault her, Mr. Egesdal terminated the session and proceeded to obtain expedited approval for her discharge. On February 10, 1972 Ms. Cichanski was informed by Mr. Egesdal and Mr. Murphy, the manager of the Quality Department, that she was being terminated effective immediately.

In sharp contrast to the consequences suffered by Ms. Cichanski, Mr. Egesdal testified that he had not discharged a male subordinate, who was an alcoholic and was habitually late in arriving at work and would disappear during

the work day. Mr. Egesdal also reaffirmed his prior testimony that "some guys were early birds and left exactly on time. Other guys would not come in on time and didn't like the fact that I reminded them of it."

The importance of such evidence of disparate consequences flowing from acts of comparable seriousness was emphasized by this Court in *McDonnell Douglas* as being competent and highly relevant proof that the stated reasons for a personnel action are in fact a pretext. Clearly a male "early bird" under Mr. Egesdal's supervision would not even be reminded of the company's hours if he occasionally or habitually left work a minute too soon. But Ms. Cichanski was loudly reprimanded, threatened with physical abuse, called into her supervisor's office for obviously punitive reasons and ultimately discharged from the job she had held for 21 years on a moment's notice.

The connection between the disparate enforcement of uniform company hours and Ms. Cichanski's discharge is so direct and immediate that it is more than mere circumstantial evidence from which an inference might be drawn that the "bad attitude" credited for her firing is "in fact a coverup for a [sexually] discriminatory decision." It is the very substance of discrimination.

The District Court observed that Honeywell made a subjective evaluation of Ms. Cichanski (although it obviously misunderstood the import of that term), and it found that Honeywell failed to follow its own policy procedures in effecting her discharge. Nevertheless, the District Court found "no reason to question the good faith of the defendant or the supervisor." (App. 5)

There can be no question but that Mr. Egesdal disliked Ms. Cichanski. The uncontradicted testimony by Ms. Cichanski and Nancy Norris, a co-worker, was that he

treated Ms. Cichanski in a "demanding, abrupt, harsh and unreasonable" manner. And it was Mr. Egesdal who procured the firing of Ms. Cichanski on the basis of his evaluation that she was the cause of the so-called "personality conflict" between them.

Mr. Bartolini, a former personnel manager for Honeywell, testified that in 1969 he had initiated a program of written work objectives which was implemented by each managerial employee negotiating the objectives with his next immediate subordinates who would in turn do the same with their subordinates until the system had been fully implemented. Mr. Egesdal testified that he had, by 1972, implemented this objective evaluation system with respect to the engineers and technicians under his supervision and believed that some secretaries had been included, but he had not negotiated work objectives with Ms. Cichanski. He further testified that the evaluation of secretaries was much more subjective than that for any other labor grade and that he would choose two to seven criteria from a master list which, with respect to attitude, required that secretaries (i.e. females) act "graciously" and "courteously" toward technicians, engineers and supervisors (i.e. males).

Honeywell responded to Ms. Cichanski's claim that she had been discharged as a result of sex discrimination by asserting that she was discharged because of her "bad attitude," manifested by an inability to get along with her supervisor, Mr. Egesdal, and an inability to get along with her co-workers. However, Mr. Bartolini admitted that he had told petitioner that her discharge was because of her "bad attitude toward her supervisor." Mr. Egesdal admitted that his evaluation of her overall performance on the very day he decided to procure her discharge was that she was an average employee with respect to both

her work performance and her conduct, and his testimony was confirmed by a form he had completed on that day. In light of this testimony, the District Court's findings that Ms. Cichanski did not get along well with certain co-workers (which was supported, at best, by two minor incidents, one of which occurred more than two years before her discharge), did not perform her work load as well as her co-workers, and resisted taking on work from other secretaries are clearly unwarranted, and such "reasons" formed no part of the basis of her discharge.

Honeywell's "Personnel Policies and Procedures" specify that the environment of an apparently "failing" employee should be carefully examined to determine if such external factors as "poor supervisory-subordinate relationships, organization confusion, inequitable treatment and the like" are causing an employee's failure. Those policies direct that the corrective action should be to remove such factors, rather than the employee. They further specify that reassignment is to be used where possible as an alternative to termination, and that a thorough review of the entire situation should be made, particularly where a long-term employee is involved. Honeywell's policies also require that "[f]or employees 40 years of age or over *and* with 15 or more years of Honeywell service, the facts of the case are to be reported to . ... [the] corporate Vice President, Employee Relations, at least one month in advance of notice of termination."

That a poor supervisory-subordinate relationship existed is beyond question, and there was ample evidence of Mr. Egesdal's inequitable, if not illegal, treatment of Ms. Cichanski. The only periodic evaluation of Mr. Egesdal prepared by his superiors during his tenure in the Quality Department criticized him for being partly responsible for the "lack of work organization" in his department and as needing "considerable improvement in basic supervisory techniques." Mr. Bartolini obtained approval of Ms. Cichanski's discharge within three days, via telephone, and she was notified of her termination effective immediately without notice, on February 10, 1972. By April 1, 1972, Mr. Egesdal had been transferred out of the Quality Department and has never since been given direct supervisory control over any woman.

While petitioner does not argue that Honeywell was legally bound to follow its own personnel policies, it is legally bound to apply them alike to both sexes. Mr. Egesdal testified that the only two men he had terminated while in the Quality Department were fired for failure to meet their agreed upon performance objectives. His only female employee, Ms. Cichanski, was not evaluated by those same standards and was terminated for an alleged bad attitude toward her supervisor even though he considered her an average employee. The gist of a Title VII violation is unequal treatment, and Honeywell utterly failed to show that a long term male employee, deemed no worse than average with respect to performance and conduct, would have been evaluated on the basis of his "graciousness" or other subjective criteria and terminated because of an alleged bad attitude, in total disregard of the procedures provided for review. Since Honeywell has wholly failed to make such a showing, the District Court's inability to find evidence of sex discrimination is inexplicable and its assigned reasons for Ms. Cichanski's discharge cannot be considered legitimate or non-discriminatory under the *McDonnell Douglas* rule.

Clearly the District Court not only refused to follow the method of analysis and observe the allocation of burdens mandated by *McDonnell Douglas,* but also refused

to accord any weight whatsoever to the very kinds of evidence that this Court foresaw would be the normal means of proving what is often subtle and elusive, but no less pernicious, discrimination.

Rather than to discipline the trial court, the Court of Appeals approved its decision, and has itself refused to apply either the rules for the allocation of the burdens and order of proofs or the teachings regarding the appropriate nature of proofs established by this Court in *McDonnell Douglas*. Although the Court of Appeals noted that the District Court had denied the respondent's motion at the close of petitioner's case-in-chief and had found a *prima facie* case of sex discrimination on each of her claims, the Appeals Court failed to consider whether respondent had established legitimate, non-discriminatory reasons for refusing to promote or transfer, and for discharging, petitioner or whether the evidence disclosed that respondent's claimed reasons were in fact used to cover up discriminatory personnel decisions.

Instead, the Court of Appeals engaged in a piecemeal consideration of parts of petitioner's evidence and noted repeatedly that certain items of evidence could give rise to a permissible inference of sex discrimination had the trial judge been inclined to draw the inference. Such a characterization of the District Court's decision ignores the plain fact that the trial judge refused to accord any weight whatsoever to the very kinds of evidence that this Court has recognized not only as competent proofs but also as the normal and usual kinds of proofs of class-based discrimination in a private, non-class action under Title VII.

By evading the mandated process of analysis, both the District Court and the Court of Appeals have avoided having to clearly articulate reasons for the anomalous

result in this case. It is absurd to suppose that Honeywell could have shown, much less did show, that a male employee, with 21 years of experience and six consecutive formal evaluations as an outstanding employee, would have been locked into the modest position of a grade three clerk-typist and then discharged because of a bad attitude toward, or a personality conflict with, a hostile supervisor, himself deemed to be lacking in basic supervisory techniques, on the basis of a wholly subjective evaluation made upon amorphous standards, and in gross violation of company policies intended to assure him of fair treatment.

The District Court stated in its opinion that Ms. Cichanski's attitude had deteriorated in part because of an alleged transportation problem and a desire to be transferred to the Arlington Heights plant, even though she denied having any transportation problems and Mr. Bartolini admitted that she had requested a transfer to any position in the company no matter where it was located, which would remove her from Mr. Egesdal's supervision. In any event, Ms. Cichanski was relocated along with everyone else in her department to the Arlington Heights plant more than two months before her discharge and persisted in seeking a transfer away from Mr. Egesdal.

Respondent's asserted policy against granting any transfers during its relocation of facilities, which occurred during 1970 and 1971, because of the purported difficulty of hiring replacements, was contradicted by records of personnel actions taken in the Quality Department during that period, which had been submitted into evidence. These records show that seven persons had been reassigned by transfer or promotion out of that department alone. Moreover the legitimacy of this asserted policy on its face is

highly questionable since it is common knowledge that many persons in the northern Chicago metropolitan area commute much greater distances to work and there was no indication that any substantial number of Honeywell employees resigned rather than arrange for transportation to its new facilities. In any event, positions for which Ms. Cichanski applied were open at both facilities.

The District Court failed to assess the legitimacy of the alleged company policies precluding a transfer in light of the conflicting documentary evidence produced by Honeywell and stated that even if the denial of a transfer was discriminatory her discharge rendered her claim of discrimination moot. But obviously if Ms. Cichanski had been granted a reassignment, the so-called "personality conflict" credited by the District Court as necessitating her discharge would no longer have existed.

Since Ms. Cichanski was erroneously precluded from presenting evidence of her qualifications for positions higher than the one she held at the time she was terminated, it is not surprising that the advisory jury found in favor of respondent on the issue of the refusal of respondent to promote her, but it is disturbing that the District Court and Court of Appeals credited her purported lack of qualifications as a legitimate basis for that action.

Although this Court has repeatedly held that the good faith of an employer is not a defense to a claim of employment discrimination under Title VII, and that disparate effect and unequal treatment are the measures of proof in such cases, the Court of Appeals sanctioned the District Court's approval of a good faith defense in this case. The trial court specifically found that there was no reason to question the "good faith" of the company or its agent in this case in a context clearly linking the issue of good faith to the employer's articulated defense to Ms. Cichanski's charges of sex discrimination and to whether or not an intent to discriminate was present. Neither of these issues were properly before the trial court, and the finding of the trial court on this issue clearly prevented the petitioner from establishing respondent's defense as pretextual.

The Court of Appeals neatly sidestepped this question on appeal by stating that, "neither the 'wisdom' nor the 'good faith' of the company's actions was at issue in this Title VII case." (App. 10) That is a correct statement of the law; but it totally ignores the error of the District Court in making a finding that the company's good faith protected its articulated defense from attack by petitioner as being pretextual.

The Court of Appeals itself found after reviewing the trial court record that Ms. Cichanski had performed "admirably" (App. 9) and had a "sterling employment record" (App. 9) at Honeywell. It further found that she was "probably treated unfairly" (App. 10) by Honeywell with respect to the actions taken by the company against her. Yet despite all this, and in the face of all of the direct and circumstantial evidence of systemic sex discrimination in employment by Honeywell and unequal treatment of Ms. Cichanski as compared with her male coworkers, and despite the "arguably correct" decisons excluding highly relevant, but "cumulative" evidence of petitioner's qualifications and systemic sex discrimination by Honeywell, the Court of Appeals affirmed the District Court's decision.

This affirmance does violence to Title VII and this Court's frequent and consistent rulings championing victims of prohibited, class-based discrimination in employment. Ms. Cichanski stands in the place of thousands of

individual victims of unlawful employment discrimination who come to the federal courts of this nation alone, and unsupported by organizations or classes of similarly aggrieved individuals, seeking the fair administration of justice. This Court should grant the instant Petition not only because of the importance of the legal issues presented, but also because of the importance of making it possible for an aggrieved individual Title VII plaintiff to be given the opportunity to have the law of the land applied to her case. Though Ms. Cichanski stands alone before this Court, the consequence of granting her petition is to assure equal treatment in the federal courts for the thousands of other working class Americans who do not have rich and powerful political or legal champions in their long and silent battles for equal employment opportunities.

2. THIS COURT SHOULD GRANT THE INSTANT PETITION BECAUSE THE SEVENTH CIRCUIT COURT OF APPEALS HAS IMPOSED AND SANCTIONED THE DISTRICT COURT'S IMPOSITION OF A DIFFERENT AND HIGHER STANDARD OF PROOF ON AN INDIVIDUAL CLAIMING SEX DISCRIMINATION IN EMPLOYMENT AS PROHIBITED BY TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED, THAN ON A SIMILARLY SITUATED INDIVIDUAL CLAIMING RACE DISCRIMINATION.

In *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1972) this Court answered crucial questions regarding the "proper order and nature of proof in actions under Title VII of the Civil Rights Act of 1964," 411 U.S. at 793-4 and, in particular, addressed issues pertaining to the "order and allocation of proof in a private, non-class action challenging employment discrimination." 411 U.S. at 800. Although Green's complaint alleged racial discrimination and much of this Court's opinion is therefore couched in the language of race, petitioner believes that this Court rendered a decision equally applicable to actions alleging discrimination on the basis of sex.

The steadfast refusal of the courts below to adhere to this Court's opinion in *McDonnell Douglas* can be understood only in terms of the imposition of a different and higher standard of proof for sex discrimination claims than for race discrimination claims.

This discrepancy becomes apparent in the grudging concession by the District Court that Ms. Cichanski had established a "rather questionable *prima facie* case" (App. 6) by showing the total absence of any female in any position above clerk-typist in her department, the differential granting of "privileges" on the basis of sex, and the

totally unexplained departure from procedures designed to safeguard the employee from unfair, arbitrary and unfounded personnel actions. A comparable showing in a race discrimination action accompanied by proof that the black person had ten years experience in the position and was rated no worse than an average employee at the very moment of his discharge, would certainly be more than a rather questionable *prima facie* case.

The higher standard becomes more obvious in the District Court's exclusion of statistical evidence of a highly stratified, plant wide job and pay structure. Such evidence has been deemed by many courts to be sufficient in itself to establish a *prima facie* case of racial bias and is almost universally accepted as highly relevant evidence in race discrimination cases.

It seems inconceivable that if a black employee were to demonstrate at trial what Ms. Cichanski did, that the District Court would find no evidence of racial discrimination in the same manner in which it found no evidence of sex discrimination in Ms. Cichanski's case.

Substituting race for sex in the instant case, we find a trial record demonstrating a black employee segregated with other blacks in a lowly position and treated differently than whites with respect to the terms and conditions of his employment. We find him to have been evaluated by a white supervisor using a much more highly subjective method upon more subjective criteria than that used for evaluating white employees. We find that despite this disparate treatment the black employee is found to be no worse than an average employee but is nevertheless discharged by his white supervisor on the basis of a "bad attitude" toward that supervisor. We find the discharge to have been accomplished in violation of established company policies. In such a context it is indeed shocking that a trial judge could avow his inability to find any evidence of racial discrimination directed toward that black employee and could find no reason to question the good faith of the employer or the supervisor. It is equally shocking that a Court of Appeals could affirm such a decision.

The Court of Appeals, in this case, after noting Ms. Cichanski's "sterling employment record," observed that:

> The evidence presented below, taken as a whole, points to the conclusion that the plaintiff was probably treated unfairly by the defendant. But Title VII does not proscribe employers from treating employees unfairly . . . (App. 10)

Then, citing Honeywell's "purported" reasons for discharging Ms. Cichanski, the Court of Appeals proceeded to characterize the evidence of sexual bias towards Ms. Cichanski (which directly caused adverse effects upon her employment status) as wholly circumstantial, giving rise only to permissible inferences which the trial judge could decline to draw. Such treatment of Ms. Cichanski's claims manifests an astonishing insensitivity to the perhaps subtle, but nonetheless invidious, forms of sex discrimination suffered by an individual woman.

As this Court has often observed, "in enacting Title VII of the Civil Rights Act of 1964, Congress intended to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin . . . (citations omitted) . . . and ordained that its policy of outlawing such discrimination should have the 'highest priority' . . . (citations omitted) . . ." *Franks* v. *Bowman Transportation Co., Inc.*, 424 U.S. 747, 96 S.Ct. 1251, 1263 (1976). In the implementation of personnel decisions, "it is abundantly clear that Title VII tolerates

no racial discrimination, subtle or otherwise." *McDonnell Dougas Corp.* v. *Green,* supra at 801. The statute is equally clear in its purpose to shield women employees from the sexually biased actions and practices of employers, in whatever forms that bias is manifested.

There is no basis in the language or the purposes of Title VII for imposing higher standards of proof upon, or ignoring equally prohibited actions against, individuals who have been victimized by sexual, rather than racial, discrimination in their employment.

Ms. Cichanski respectfully submits that this Court should grant this Petition for Certiorari to clarify that the standards governing the proof of individual non-class actions under Title VII are the same without regard to the basis of the discrimination suffered and that persons who have suffered injuries as a result of unjustifiable discrimination based on sex are equally entitled to have their claims recognized and to be afforded relief.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

TERRY YALE FEIERTAG
Attorney for Petitioner

Of Counsel:
DALE E. MCNIEL
JOSEPH MINSKY
MINSKY, LICHTENSTEIN & FEIERTAG, P.C.
39 South LaSalle Street, Suite 705
Chicago, Illinois 60603
(312) 782-2213

APPENDIX

7

APPENDIX A

JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

(Entered on April 28, 1976)

Enter decision that the complaint be dismissed & that judgment be entered in favor of the defendant pursuant to F.R.C.P. 52 & 58. (DRAFT)

/s/ *Thomas R. McMillen*, Judge

APPENDIX B

DECISION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

UNITED STATE DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CHARLOTTE CICHANSKI,

Plaintiff,

v.

HONEYWELL INC.,

Defendant.

No. 74 C 754

DECISION
(Entered on April 28, 1976)

This case came on to be heard under Title VII of the Civil Rights Act of 1964. Plaintiff contends that she was discharged by the defendant because of her sex after twenty-one (21) years of employment. The case was tried with an advisory jury, and the defendant's motion for a finding at the close of the plaintiff's evidence was denied. The jury rendered a verdict in favor of the plaintiff on the issues of her discharge and on defendant's refusal to transfer her but rendered a verdict in favor of the defendant on the issue of its failure to promote her. We nevertheless find and conclude that judgment should be entered on all issues in favor of the defendant on the weight of the evidence.

The plaintiff bases her case of discrimination almost entirely upon circumstantial evidence. The facts are that substantially more men are employed in certain positions of the defendant's plant than are women and at generally higher salaries, that men are given greater privileges with respect to lunch, coffee breaks and late arrival than women, and that defendant discharged the plaintiff without following its usual written policy procedures. At the close of the plaintiff's evidence, we found that these circumstances gave rise to a possible inference of discriminatory conduct by the defendant based upon sex and that it would be preferable to hear all of the evidence for both parties before rendering a final decision. See *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 432 (1971).

Plaintiff's charges with the E.E.O.C. dated June 10, 1972 consist of the following:

> I believe I have been discriminated against because after working for Honeywell for over 21 years I have been terminated without a just cause. I believe the Personnel Department discriminated against me because they terminated me after ignoring my request to have someone from the Personnel Department be present during meetings when my boss harassed me. I believe the Personnel Department discriminated against me when they refused me promotions for which I qualified. I believe Personnel Department denied me equal wages that other secretaries were paid for the same type of work. I believe the company discriminated against me when they over-ruled my doctor's statement that I be given another month sick leave after my foot surgery by threatening me with termination and stopping my sick leave pay. I had to return to work wearing houseslippers. I believe my supervisor Sanford Egesdal discriminated against me because the men in the department had many privileges but I was confined to strict rules. I believe the com-

pany discriminated against women when we were replaced by men in the Production Planning department and our job of Record Clerk was changed to Record Analyst and the job was made 2 labor grades higher. I believe the company discriminated against me for the last 12 years by not allowing me to stay in or progress into the higher labor grade positions and thus owes me back pay of at least $24,000. I believe the company was aware of the repercussions that could arise from this act and tried to coerce me into signing resignation papers. I believe I am further being discriminated against because my husband works for the same company and has been denied to carry me on his Major Medical Insurance Group Plan to which every worker is entitled to.

Defendant's evidence showed that plaintiff's work performance and general attitude deteriorated during the last few years of her employment. Some of this arose because she wished to be transferred to the new location where her husband had previously been transferred, in advance of the defendant's schedule which would eventually have placed her there. This desire for an expedited transfer would accommodate her transportation to work by private automobile with her husband but was steadfastly resisted by the defendant.

A more serious problem developed between the plaintiff and her supervisor Sanford Egesdal which can best be described as a "personality conflict". This relationship began in December 1969 and ended with plaintiff's discharge in February 1972. It affected the work of other employees and eventually resulted in plaintiff's termination for what was generally described as a "bad attitude". This was not reduced to writing but reflects a report made by a prior supervisor of the plaintiff dated 5-11-66 which included:

The principle reason for the delay in not recommending this increase has been an attitude problem. Charlotte while doing excellent work, has been a disturbing influence due to her continuous grumbling, complaining and lack of interest in finding better ways of doing things. In the past 3-4 mos. there has been a significant improvement in this area as demonstrated by several suggestions she made that have improved the clerical efficiency of the group.

Defendant concedes that it made a "subjective evaluation", apparently meaning that it was based upon the plaintiff's state of mind as well as the supervisor's state of mind. In any event, we find no reason to question the good faith of the defendant or the supervisor. The defendant's evidence shows that, during her last few years of employment, the plaintiff did not get along well with certain of her fellow employees, she did not perform her work load as well as her co-employees, and she resisted taking on work from other persons in her classification when necessary or when she had the time.

Most importantly, there is no question but that she and Mr. Egesdal had a serious conflict which affected the work of both of them and could not be solved except by her discharge. Unfortunately, the company did not see fit to transfer either one of these long-term employees in order to eliminate this problem, but the wisdom of its decision is not an issue. There is no evidence whatsoever that the plaintiff was discharged because of her sex, and the jury properly found that she was not denied a promotion for this reason. She was not qualified for a higher position in the department, and her particular job classification was generally filled by women. Her replacement was a woman. Therefore, any inference that may have been possible from the factors relied upon by the plaintiff indicating a gen-

eral policy of discrimination by the defendant have been overcome by the weight of the evidence. There is no evidence on which to base the conclusion that the plaintiff was discharged at least in part because she was a woman. Therefore, the plaintiff's rather questionable *prima facie* case was completely overcome by the evidence to the contrary.

Plaintiff relies upon a syllogism which, in our opinion, is defective. Her reasoning apparently is (a) she is a woman; (b) defendant discriminates against women with respect to job classifications, salary, and working conditions; (c) therefore defendant discriminated against the plaintiff when she was discharged. However, there is no objective evidence that the defendant discriminated generally against women either with respect to job classifications or other terms and conditions of work. They were not treated entirely the same as men, because the job content and their duties differed. On the other hand, there is no evidence that the difference in treatment was because they were women. But even if it might be concluded that the defendant discriminated generally against women, it does not follow that the plaintiff was discharged because of this. There were valid reasons for her discharge, although admittedly this is a harsh measure, particularly in the case of a long-term employee.

The jury also found that the defendant failed to transfer the plaintiff in part because she was a woman. We find no evidence of this, the refusal to transfer being based upon a company policy to make transfers to its new location on a certain schedule which caused the plaintiff's husband to be transferred before she was. Even if this particular act was based on sex discrimination, however, we fail to see how it can be compensated by damages. The

plaintiff was properly discharged, and the question of her transfer became moot thereafter. Furthermore, even if she were to be reinstated, it would be at the same plant where her husband is now employed. The alleged discrimination for refusing a premature transfer would have been temporary and *de minimus*.

The jury found no discrimination with respect to the failure to promote the plaintiff. We agree with this particular verdict and believe it is in accord with the weight of the evidence.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the complaint be dismissed and that judgment be entered in favor of the defendant pursuant to F.R.C.P. 52 and 58.

ENTER:

/s/ Thomas R. McMillen
Judge, U. S. District Court

Dated: Apr. 28, 1976

APPENDIX C

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

(Entered on January 13, 1977)

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604
(Argued December 6, 1976)
January 13, 1977.

Before
Hon. Luther M. Swygert, Circuit Judge
Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. William J. Bauer, Circuit Judge

CHARLOTTE CICHANSKI,

Plaintiff-Appellant,

No. 76-1671 vs.

HONEYWELL, INC.,

Defendant-Appellee.

On Appeal From the United States District Court for the Northern District of Illinois, Eastern Division.
No. 74 C 754
Thomas R. McMillen, Judge.

ORDER

Plaintiff appeals from an adverse judgment on three sex discrimination claims brought under Title VII. She claimed at trial that the defendant refused to promote or transfer her, and then discharged her, at least partly because of her sex. The defendant answered that plaintiff was denied

promotion because she was unqualified for one, refused a transfer because of legitimate, nondiscriminatory company policies, and discharged because of her inability to get along with her supervisor and co-workers.

The case was tried to the district court sitting with an advisory jury. The jury found that the defendant had not discriminated against plaintiff on the basis of sex in denying her a promotion, but that it had illegally denied her a transfer and discharged her because of her sex. Notwithstanding these special verdicts, the district court entered judgment for the defendant on all three of plaintiff's claims. We affirm the district court for the reasons noted below.

Plaintiff is a 55-year-old woman who was employed by the defendant from 1950 until her discharge in 1971. During her 21 years with the company, she performed a number of jobs admirably enough to have received a series of merit salary increases and, with rare exception, favorable work evaluations. In light of that sterling employment record, she believes that the company's discharge of her in violation of its own policies, as well as its failure to promote or transfer her, must be attributable at least in part to sexual bias. This inference is buttressed, she argues, by statistical evidence of sexual stratification in the clerical, technical, administrative and supervisory job classifications of the defendant's plants that reveals the company's predisposition to discriminate against women. The inference of sexual bias created thereby is further strengthened, says plaintiff, by the company's sexually discriminatory enforcement of work rules with respect to lunch periods, coffee breaks and late arrival.

Plaintiff's principal argument on appeal is that she made out a prima facie case of sex discrimination on the basis of the above evidence, and that the defendant failed to meet its burden under *McDonnell-Douglas Corp.* v. *Green,* 411 U.S. 792 (1973), of coming forward with evidence showing a legitimate, nondiscriminatory reason for discharging her and refusing to transfer or promote her. According to the plaintiff, the district court's findings to the contrary are clearly erroneous. She also contends that the court committed reversible error in excluding certain evidence and in commenting that, because she had been properly discharged, her transfer claim was moot. We find all of her arguments without merit.

The evidence presented below, taken as a whole, points to the conclusion that the plaintiff was probably treated unfairly by the defendant. But Title VII does not proscribe employers from treating employees unfairly, as long as the actions complained of are not taken on the basis of impermissible factors such as sex. We agree with the district court's observations that neither the "wisdom," nor the "good faith" of the company's actions was at issue in this Title VII case. The only issues properly before the district court were whether the defendant refused to promote or transfer the plaintiff, or discharged her, at least in part because of her sex. Viewing the evidence and all reasonable inferences therefrom in the light most favorable to the defendant, as we must at this stage of review, we cannot say that the district court's findings were clearly erroneous.

However unfair, the defendant's discharge of the plaintiff because of her purported inability to get along with her supervisor and fellow employees is not proscribed by Title VII unless it stems at least in part from sexual bias. To be

sure, triers of fact are entitled to treat subjective evaluations used as a basis for discipline or discharge with healthy skepticism, at least when they conflict with favorable evaluations contained in an employee's personnel file or when they emanate from supervisors who are not members of the Title VII-protected class to which the employee belongs. *Caro* v. *Schultz,* 521 F.2d 1084, 1086 (7th Cir. 1975); *Rowe* v. *General Motors Corp.,* 457 F.2d 348, 359 (5th Cir. 1972). But the skepticism appropriate in such instances does not prevent the trier of fact from crediting testimony indicating that the subjective evaluation was the product of factors other than impermissible bias, such as the personality clash established by the testimony presented during the trial. We cannot say that the district court's finding that the plaintiff was discharged because of her "bad attitude" and inability to get along with her supervisor and co-workers was clearly erroneous.

Similarly, the court's finding that the defendant's unwillingness to promote plaintiff was not attributable to sexual bias cannot be deemed clearly erroneous. Even the advisory jury found that the plaintiff had not been denied a promotion because of her sex, and the district court's like finding is supported by the evidence.

As to the plaintiff's refusal-to-transfer claim, the evidence, when viewed in the light most favorable to the defendant, is also sufficient to support the court's judgment. According to testimony brought out at trial, the company's refusal to transfer plaintiff from its Morton Grove plant to its new plant in Arlington Heights was based on a nondiscriminatory policy against transferring personnel before the time set by a general relocation schedule. The company also presented evidence that its refusal to transfer plaintiff to a different department within the

same plant in which she worked was based on a settled company policy against transferring personnel merely to assuage conflicts with supervisors or co-workers. Plaintiff argues that because positions for which she applied and was qualified were open at both the Morton Grove and Arlington Heights plants, and because it was company policy to alleviate "demotivating influences" in the work environment prior to discharging a failing employee, the refusal to transfer must necessarily have been due to sexual bias. Although we agree that such an inference could be drawn from such evidence, it was for the trier of fact to determine whether that inference *should* be drawn. We cannot say that the district court's action in crediting the defendant's testimony and refusing to draw the inference of sexual discrimination permitted by plaintiff's evidence was clearly erroneous.

Nor do we agree with the plaintiff that the district court committed reversible error by commenting that the issue of her transfer was moot because she had been properly discharged. As we read the district judge's memorandum opinion, his comment was a hypothetical statement that was directed to the remedial problem that would have been created had he found plaintiff's transfer claim meritorious while simultaneously finding that her discharge was not sex-related. Thus, we do not understand the judge to have meant by his comment that a sex-related refusal to transfer was in itself a de minimis breach of the law, or that he was so unimpressed by the nature of the injury attributable thereto as to have effectively disregarded the issue and the supporting evidence adduced by plaintiff.

Plaintiff's most persuasive arguments on appeal are that the district court erred by refusing to admit evidence of plaintiff's qualifications for other jobs, as well as statistical data of the company's highly stratified pay and

job structure tending to show that it systemically discriminated against women. But, even assuming the relevancy of this evidence, we are not convinced that its exclusion was prejudicial.

With respect to the evidence bearing on the plaintiff's abilities to handle other jobs, we believe that, at the time the evidence was offered, the court was arguably correct in excluding it because the plaintiff failed to lay a foundation showing that opportunities for promotion or transfer within the plant existed. Moreover, this evidence was largely cumulative of the parties' stipulations and the plaintiff's own testimony regarding the various work assignments she had performed during her 21 years with the company. The evidence already admitted showed her qualifications for promotion or transfer, and the evidence excluded did not directly prove that she was denied a promotion or transfer because of sexual bias. At most, the excluded evidence would have raised only a permissible inference of discrimination, an inference that the trier of fact could have drawn from other evidence already admitted had the court been inclined to so do.

As to the evidence of job and salary stratification proffered to show the company's predisposition to discriminate against women, the same analysis applies. Though relevant even in an individual suit, *Burns* v. *Thiokol Chem. Co.*, 483 F.2d 300, 305 (5th Cir. 1973), the statistical data adduced was largely cumulative of other data already in evidence on which the district court relied in determining that plaintiff had made out a prima facie case of discrimination. Were this a class action, we might be inclined to look more carefully at the district court's exclusionary ruling. However, in this individual suit, the class data excluded could at most give rise to the same

permissible inference of discrimination that the district court took note of in denying defendant's motion for a directed verdict at the close of plaintiff's case in chief.

Because the evidence excluded by the district court was cumulative of testimony and data already before the court, we do not believe that reversible error was committed by its exclusion. *McDonald* v. *Milwaukee Mechanic's Ins. Co.*, 167 F.2d 276, 278-79 (7th Cir.), *cert. denied*, 334 U.S. 845 (1948); *see* 28 U.S.C. § 2111; Fed. R. Civ. P. 61.

For the reasons noted above, we affirm the district court's judgment.

AFFIRMED.

APPENDIX D

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

(Entered on February 15, 1977)

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604
February 15, 1977

Before
Hon. Luther M. Swygert, Circuit Judge
Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. William J. Bauer, Circuit Judge

CHARLOTTE CICHANSKI,
Plaintiff-Appellant,

No. 76-1671 vs.

HONEYWELL, INC., a foreign corporation,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 74-C-754

On consideration of the petition for rehearing and suggestion that it be reheard *in banc* filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge having voted to grant the suggestion, and all of the members of the panel having voted to deny a rehearing,

IT IS ORDERED that the petition for a rehearing in the above-entitled cause be, and the same is hereby, DENIED.

APPENDIX E

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

SUPREME COURT OF THE UNITED STATES
No. A-905

CHARLOTTE CICHANSKI,

Petitioner,

v.

HONEYWELL, INC.

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 15, 1977.

/s/ John Paul Stevens
Associate Justice of the Supreme Court of the United States

Dated this 5
day of May, 1977.